

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY  
**AGENDA ITEM REQUEST**  
for Proposed Rulemaking

**AGENDA REQUESTED:** April 8, 2020

**DATE OF REQUEST:** March 20, 2020

**INDIVIDUAL TO CONTACT REGARDING CHANGES TO THIS REQUEST, IF NEEDED:** Andreea Vasile, Rule/Agenda Coordinator, (512) 239-1806

**CAPTION: Docket No. 2019-1580-RUL.** Consideration for publication of, and hearing on, proposed amended Section 336.1310 of 30 TAC Chapter 336, Radioactive Substance Rules.

The proposed rulemaking would lower the minimum rate for nonparty generators and the maximum rate for party state and nonparty generators. (Hans Weger, Amie Robinson) (Rule Project No. 2020-009-336-WS)

Brent Wade  
**Deputy Director**

Ashley Forbes  
**Division Director**

Andreea Vasile  
**Agenda Coordinator**

**Copy to CCC Secretary?** NO ☒ YES

# Texas Commission on Environmental Quality

## Interoffice Memorandum

**To:** Commissioners **Date:** March 20, 2020

**Thru:** Bridget C. Bohac, Chief Clerk  
Toby Baker, Executive Director

**From:** Brent Wade, Deputy Director  
Office of Waste

**Docket No.:** 2019-1580-RUL

**Subject:** Commission Approval for Proposed Rulemaking  
Chapter 336, Radioactive Substance Rules  
Rate Adjustments – Disposal of Low-Level Radioactive Waste  
Rule Project No. 2020-009-336-WS

### **Background and reason(s) for the rulemaking:**

Texas Health and Safety Code (THSC), §401.245, requires the Texas Commission on Environmental Quality (commission or agency) by rule to adopt and periodically revise party state compact waste disposal fees. Section 336.1310 sets the fees for disposal of low-level radioactive waste (LLRW).

In 2017, House Bill (HB) 2662, passed during the 85th Texas Legislature, reduced the disposal surcharge for non-compact generators from 20% to 10% and suspended the 5% state fee for all compact waste until September 1, 2019. During the 86th Texas Legislature (2019), an amendment was made to Senate Bill (SB) 1804 that would retain the reduction of this surcharge and the suspension of the state fee until September 1, 2021. Because SB 1804 was vetoed, the surcharge reverted back to 20% and the 5% state fee was reinstated on September 1, 2019.

The licensee and operator of the Compact Waste Disposal Facility in Andrews County, Texas, originally requested a similar reduction to the curie inventory charge among other items as part of a rulemaking petition in order to be competitive and to generate sufficient funds so that they do not operate at a financial loss. The rulemaking petition was withdrawn and resubmitted as a request to the executive director to initiate rulemaking for good cause, consistent with the rule requirements in §336.1311.

### **Scope of the rulemaking:**

#### **A.) Summary of what the rulemaking would do:**

The proposed rulemaking would amend §336.1310 to adjust the curie inventory charge.

#### **B.) Scope required by federal regulations or state statutes:**

In accordance with THSC, §401.245, the proposed rulemaking would revise party state compact waste disposal fees (curie inventory charge).

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**C.) Additional staff recommendations that are not required by federal rule or state statute:**

None.

**Statutory authority:**

The amendment would be proposed under the Texas Radiation Control Act, THSC, §401.011, which provides the commission authority to regulate and license the disposal of radioactive substances; and THSC, §401.245, which requires the commission, by rule, to adopt and periodically revise party state compact waste disposal fees.

The proposed amendment would also be authorized by Texas Water Code (TWC), §5.103, which establishes the commission's general authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of this state.

**Effect on the:**

**A.) Regulated community:**

Both the licensee and generators of LLRW would be affected. The disposal rates serve as a floor for rates charged by the licensee to nonparty generators and the ceiling for rates charged to party state generators for disposal of LLRW. Amending §336.1310 would lower the minimum rate for nonparty generators and the maximum rate for party state generators, resulting in potentially lower disposal costs for both party and nonparty generators.

**B.) Public:**

There would be no direct impact to the public anticipated with this rulemaking.

**C.) Agency programs:**

There would be no direct impact to other agency programs with this rulemaking.

**Stakeholder meetings:**

The commission did not hold any stakeholder meetings related to this rulemaking; however, a rule public hearing will be held during the comment period in Austin. No comments and no requests for contested case hearing were received.

**Potential controversial concerns and legislative interest:**

During the 86th Legislative Session, two companion bills, SB 1021 and HB 2269, were filed that would have reduced the surcharges for nonparty compact waste from 10% to 5%. These companion bills also proposed to repeal the statute that requires the licensee to transfer 5% of the gross receipts received from any compact waste or federal waste to the state general revenue fund each quarter. Neither SB 1021 nor HB 2269 passed.

Also, during the 86th Legislative Session, an amendment was made to a bill that addressed domestic violence, SB 1804, that proposed to retain the surcharges that HB 2662 reduced. SB 1804 was vetoed by Governor Abbott.

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**Would this rulemaking affect any current policies or require development of new policies?**

No.

**What are the consequences if this rulemaking does not go forward? Are there alternatives to rulemaking?**

The commission could decide not to amend rules to lower the curie inventory charge. The licensee has stated that the lower curie inventory charge is needed to stay competitive after the surcharges on disposal of nonparty compact waste changed from 16.25% to 31.25% on September 1, 2019.

**Key points in the proposal rulemaking schedule:**

**Public Comment Period and Opportunity for Contested Case Hearing:** February 7, 2020 - March 10, 2020

**Anticipated proposal date:** April 8, 2020

**Anticipated *Texas Register* publication date:** April 24, 2020

**Anticipated public hearing date (if any):** May 18, 2020

**Anticipated public comment period:** April 24, 2020 - May 26, 2020

**Anticipated adoption date:** July 1, 2020

**Agency contacts:**

Hans Weger, Rule Project Manager, Radioactive Materials Division, (512) 239-6465

Amie Robinson, Staff Attorney, (512) 239-2999

Andreea Vasile, Texas Register Rule/Agenda Coordinator, (512) 239-1806

**Attachments:**

None.

cc: Chief Clerk, 2 copies  
Executive Director's Office  
Jim Rizk  
Morgan Johnson  
Brody Burks  
Office of General Counsel  
Hans Weger  
Andreea Vasile

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) proposes to amend §336.1310.

### **Background and Summary of the Factual Basis for the Proposed Rule**

Texas Health and Safety Code (THSC), §401.245, requires the TCEQ by rule to adopt and periodically revise party-state compact waste disposal fees. Section 336.1310 sets the fees for disposal of low-level radioactive waste (LLRW).

In 2017, House Bill (HB) 2662, passed during the 85th Texas Legislature, reduced the disposal surcharge for non-compact generators from 20% to 10% and suspended the 5% state fee for all compact waste until September 1, 2019. During the 86th Texas Legislature (2019), an amendment was made to Senate Bill (SB) 1804 that would retain the reduction of this surcharge and the suspension of the state fee until September 1, 2021. Because SB 1804 was vetoed, the surcharge reverted back to 20% and the 5% state fee was reinstated on September 1, 2019.

The licensee and operator of the Compact Waste Disposal Facility (CWF) in Andrews County, Texas, originally requested a similar reduction to the curie inventory charge (mCi) among other items as part of a rulemaking petition in order to be competitive and to generate sufficient funds so that they do not operate at a financial loss. The rulemaking petition was withdrawn and resubmitted as a request to the executive director to initiate rulemaking for good cause, consistent with the rule requirements in §336.1311.

Therefore, the executive director has taken all of these factors into consideration and determined that the reduction in the curie inventory charge is appropriate at this time.

### **Section Discussion**

#### *§336.1310, Rate Schedule*

The commission proposes to amend §336.1310 to reduce the mCi from \$0.40 mCi to \$0.05 mCi. The commission also proposes to amend §336.1310 to correct the acronym LLW to LLRW to be consistent with the current definition in §336.2.

### **Fiscal Note: Costs to State and Local Government**

Jené Bearse, Analyst in the Budget and Planning Division, determined that for the first five-year period the proposed rule is in effect, fiscal implications are probable for the agency and for other units of state or local government as a result of administration of the proposed rule; however due to market competition, the implications cannot be determined.

This proposed rulemaking would lower the curie inventory fee charged to out-of-compact customers by the Compact Waste Disposal Facility in Andrews County. The fee is one part of the price or contracted rate that a customer pays to dispose of waste at the facility. The curie inventory fee is not collected by the state of Texas or local government. The revenue paid to the state is a percentage surcharge of the contracted rate. Without regard to market demands and competitive options for waste disposal, one could assume that

this proposed rulemaking would result in decreased revenue for the state and local government; however, this analysis assumes that market demands would influence the volume of waste received at the facility, as it has been demonstrated in the past.

The proposed rulemaking would lower the cost to the waste generator or customer, making the facility more competitive in the market. This may result in an increase or decrease to state and local revenue depending on the decisions made by the waste generator or customer.

Per the THSC, the revenue paid to the state consists of the surcharge for the disposal of nonparty compact waste equal to 20% of the total contracted rate and a 5% surcharge on the gross receipts from compact waste or federal facility waste deposited at the facility. These two fees were temporarily decreased during the 85th Legislative Session by the passage of HB 2662 for a period of two years, after which, the fees returned to their original amount on September 1, 2019. The state also assesses a 1.25% surcharge to support the activities of the Texas Low-Level Radioactive Waste Disposal Compact Commission. An additional 5% surcharge from the gross receipts from compact waste and federal facility waste is collected and transferred to Andrews County, a unit of local government.

### **Public Benefits and Costs**

Ms. Bearse determined that for each year of the first five years the proposed rule is in effect, the public should not be affected by the proposed rulemaking as it should not

affect the health and safety aspects of the facility.

#### **Local Employment Impact Statement**

The commission reviewed this proposed rulemaking and determined that a Local Employment Impact Statement is not required because the proposed rulemaking would not adversely affect a local economy in a material way for the first five years that the proposed rule is in effect.

#### **Rural Community Impact Statement**

The commission reviewed this proposed rulemaking and determined that the proposed rulemaking would not adversely affect rural communities in a material way for the first five years that the proposed rule is in effect.

#### **Small Business and Micro-Business Assessment**

No adverse fiscal implications are anticipated for small or micro-businesses due to the implementation or administration of the proposed rule for the first five-year period the proposed rule is in effect.

#### **Small Business Regulatory Flexibility Analysis**

The commission reviewed this proposed rulemaking and determined that a Small Business Regulatory Flexibility Analysis is not required because the proposed rule would not adversely affect a small or micro-business in a material way for the first five years the proposed rule is in effect.



### **Government Growth Impact Statement**

The commission prepared a Government Growth Impact Statement assessment for this proposed rulemaking. The proposed rulemaking would not create or eliminate a government program and would not require an increase or decrease in future legislative appropriations to the agency. The proposed rulemaking would not require the creation of new employee positions nor eliminate current employee positions. The proposed rulemaking may increase or decrease surcharge revenue paid to the state, but the impact cannot be determined. The proposed rulemaking would not create, expand, repeal or limit an existing regulation, nor would the proposed rulemaking increase or decrease the number of individuals subject to its applicability. During the first five years, the proposed rule should not impact positively or negatively the state's economy.

### **Draft Regulatory Impact Analysis Determination**

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225, because it does not meet the definition of a "Major environmental rule" as defined in the Texas Administrative Procedure Act. A "Major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

This rulemaking does not meet the statutory definition of a "Major environmental rule" because it is not the specific intent of the rule amendment to protect the environment or reduce risks to human health from environmental exposure. The specific intent of the proposed rulemaking is to modify the mCi and may offset the increase in the total disposal fee for out-of-compact generators due to the increase of surcharges on this waste that went into effect on September 1, 2019. The reduction of the curie inventory fee in the LLRW disposal rate table of §336.1310 would require the license holder of the CWF to adjust the rate setting for generators as follows. The LLRW fee adjustment would result in a lowering of the maximum rate that the license holder can charge Compact generators of LLRW and a lowering of the minimum rate that the license holder can charge Out-of-Compact generators of LLRW.

Further, the rulemaking does not meet the statutory definition of a "Major environmental rule" because the proposed rule would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or public health and safety of the state or a sector of the state. The cost of complying with the proposed amendment is not expected to be significant with respect to the economy as a whole or a sector of the economy; therefore, the proposed rulemaking would not adversely affect in a material way the economy, a sector of the economy, productivity, competition, or jobs.

Furthermore, the proposed rulemaking does not meet the statutory definition of a "Major

environmental rule" because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a), only applies to a major environmental rule, the result of which is to: (1) exceed a standard set by federal law, unless the rule is specifically required by state law; (2) exceed an express requirement of state law, unless the rule is specifically required by federal law; (3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or (4) adopt a rule solely under the general powers of the agency instead of under a specific state law. The proposed rulemaking does not meet the four applicability requirements because the proposed amendment: (1) does not exceed a standard set by federal law; (2) does not exceed an express requirement of state law; (3) does not exceed a requirement of federal delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program as no such federal delegation agreement exists with regard to the proposed rule; and (4) is not an adoption of a rule solely under the general powers of the commission as the proposed amendment is required by THSC, §401.245. THSC, §401.245, requires the TCEQ by rule to adopt and periodically revise party-state compact waste disposal fees.

Written comments on the Draft Regulatory Impact Analysis Determination may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

### **Takings Impact Assessment**

The commission evaluated this proposed rulemaking and performed an assessment of whether the proposed rulemaking constitutes a taking under Texas Government Code, Chapter 2007. The proposed rulemaking amends §336.1310 to adjust one fee charged in the rates. The specific intent of the proposed rulemaking is to modify the mCi to offset the increase in the total disposal fee for out-of-compact generators due to the increase of surcharges on this waste that went into effect on September 1, 2019. The reduction of the mCi fee on LLRW disposal rate schedule solely impacts the license holder of the CWF in rate setting for generators as follows. The LLRW fee adjustment would result in a lowering of the maximum rate that the license holder can charge Compact generators of LLRW and a lowering of the minimum rate that the license holder can charge Out-of-Compact generators of LLRW. The commission's analysis revealed that amending the fee in the rate table section of §336.1310 is consistent with THSC, §401.245, which requires the TCEQ by rule to adopt and periodically revise party-state compact waste disposal fees.

A "taking" under Texas Government Code, Chapter 2007 means a governmental action that affects private real property in a manner that requires compensation to the owner under the United States or Texas Constitution, or a governmental action that affects real private property in a manner that restricts or limits the owner's right to the property and reduces the market value of affected real property by at least 25%. Because no taking of private real property would occur by amending the maximum disposal rate that a licensee may charge a party state generator for disposal to reduce the mCi, the commission

determined that promulgation and enforcement of this proposed rulemaking would be neither a statutory nor a constitutional taking of private real property. Specifically, there are no burdens imposed on private real property under the rule because the proposed rulemaking neither relates to, nor has any impact on, the use or enjoyment of private real property, and there would be no reduction in real property value as a result of the rulemaking. Therefore, the proposed rulemaking would not constitute a taking under Texas Government Code, Chapter 2007.

#### **Consistency with the Coastal Management Program**

The commission reviewed the proposed rule and found it is neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor would it affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rule is not subject to the Texas Coastal Management Program.

Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the Submittal of Comments section of this preamble.

#### **Announcement of Hearing**

The commission will hold a public hearing on this proposal in Austin on May 18, 2020, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of

registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Sandy Wong, Office of Legal Services at (512) 239-1802 or 1-800-RELAY-TX (TDD). Requests should be made as far in advance as possible.

### **Submittal of Comments**

Written comments may be submitted to Andreea Vasile, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at:

<https://www6.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2020-009-336-WS. The comment period closes on May 26, 2020. Copies of the proposed rulemaking can be obtained from the commission's website at [https://www.tceq.texas.gov/rules/propose\\_adopt.html](https://www.tceq.texas.gov/rules/propose_adopt.html). For further information, please contact Hans Weger, Radioactive Materials Section, (512) 239-6465.

**SUBCHAPTER N: FEES FOR LOW-LEVEL RADIOACTIVE WASTE DISPOSAL**

**§336.1310**

**Statutory Authority**

The amendment is proposed under the Texas Radiation Control Act, Texas Health and Safety Code (THSC), §401.011, which provides the commission the authority to regulate and license the disposal of radioactive substances; and THSC, §401.245, which requires the commission, by rule, to adopt and periodically revise party state compact waste disposal fees. The proposed amendment is also authorized by Texas Water Code (TWC), §5.103, which establishes the commission's general authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of this state.

The proposed amendment implements THSC, §401.245.

**§336.1310. Rate Schedule.**

Fees charged for disposal of party state compact waste must be equal to or less than the compact waste disposal fees under this section. Additionally, fees charged for disposal of nonparty compact waste must be greater than the compact waste disposal fees under this section.

**Figure: 30 TAC §336.1310**

**[Figure: 30 TAC §336.1310]**

### Disposal Rate for the Compact Waste Disposal Facility

#### 1. Base Disposal Charge:

<b>1A. Waste Volume Charge</b>	Charge per cubic foot (\$/ft <sup>3</sup> )
Class A <u>Low-Level Radioactive Waste (LLRW)</u> [LLW]	\$100
Class B and C <u>LLRW</u> [LLW]	\$1,000
Sources - Class A	\$500

<b>1B. Radioactivity Charge</b>	
Curie Inventory Charge (\$/millicurie (mCi))	<u>\$0.05</u> [\$0.40]
Maximum Curie Charge (per shipment) (excluding C-14)	\$220,000/shipment

#### 2. Surcharges to the Base Disposal Charge:

<b>2A. Weight Surcharge - Weight (lbs.) of Container</b>	Surcharge (\$/container)
Greater than 50,000 lbs	\$20,000

<b>2B. Dose Rate Surcharge - Surface Dose Rate (R/hour) of Container</b>	Surcharge per cubic foot (\$/ft <sup>3</sup> )
Greater than 500 R/hour	\$400

<b>2C. Irradiated Hardware Surcharge</b>	
Surcharge for special handling per shipment	\$75,000/shipment